NO. 20893

United States Court of Appeals

NINTH CIRCUIT

MICHELE MARCHESE,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

JESSE DEL BONO,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

APPELLANTS' REBUTTAL BRIEF

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APPELLANTS' REBUTTAL BRIEF

We have thoroughly discussed appellants' views and contentions in our Opening Brief. The discussion set forth therein fully and effectively refutes the argument of appellee, so we shall not endeavor in this brief to reiterate much of our argument contained therein, but will from time to time refer to said brief, using the initials "O.B." However, even at the risk of some repetition, we shall briefly rebut some of the points raised by appellee in its Reply Brief, and correct some of the statements made therein. In so doing we shall reply to such appellee's statements, contentions, and arguments as we deem necessary in the order that they appear in its brief, using appellee's numbering of its headings, and referring to said brief as "R.B."

I

[R.B. p. 1]

On page 2, R.B., appellee stated that the motions of appellants were denied. Actually they were "denied without prejudice pending further clarification by the Circuit Court of Appeals of its opinion and decision." (Clerk's Transcript [referred to herein as C.T.] p. 209) The District Court did not deny the motions of appellants as new or supplemental

motions, but reserved its "determination of such questions following further clarification of its decision, opinion and mandate by the Circuit Court." (C.T. p. 209) It is elemental that a formal order or judgment made by a court is the only order to be considered, and that remarks of the trial judge at the hearing do not stand as against a formal written order made and signed by him.

We further take issue with appellee's statement that the District Court had no jurisdiction to entertain such motions.

III

[R.B. p. 6]

On page 12, R.B., appellee again makes the statement that Judge Clarke denied the motion. We refer to our correction of said statement, *supra*.

IV

[R.B. p. 17]

Contrary to appellee's contention, we submit that, construing the opinion of the Circuit Court as a whole, there was definitely an intention that the District Court should have further proceedings to correct deficiencies

in its findings and conclusions and in the relief afforded appellants. (See discussion O.B. pp. 29-39)

The statement of appellee that the instant appeal represents an improper attempt to relitigate issues conclusively laid to rest, is without foundation and has been refuted in our Opening Brief, and will be discussed *infra* in this brief.

V

[R.B. p. 18]

The proposed Amended Finding I (R.B. p. 20) was submitted to Judge Clarke because the Circuit Court had determined and found as a fact itself that no promise of leniency or of a lighter sentence was made to Sussman. Judge Clarke was bound by such finding of this Court even though he disagreed with it. In our Opening Brief (pp. 42-50) and in the Petition for Rehearing on this Court's decision, we pointed out that this Court disregarded its long established rules of appellate review in overturning Judge Clarke's finding. We also suggested that this Court may now review and revise its previous decision. (O.B. pp. 42-44)

With respect to Marchese's Amended Finding XII and

Del Bono's XI (R.B. p. 23), we submit that it follows the rules laid down in *Sanders v. United States*, 373 U.S. 1, and is in accordance with the mandate of the Supreme Court in *Marchese v. United States*, 374 U.S. 101.

Appellee attacks Amended Finding IX and Conclusion IV on the ground that Marchese had no right to object to the search of Del Bono's automobile without a search warrant, under the case of *Jones v. United States*, 362 U.S. 257. Both Marchese and Del Bono were "aggrieved parties," since the evidence was used against them. Furthermore, the federal agents had ample time to obtain search warrants, because if Sussman's statements were to be believed, they must have known beforehand what was going to be done with the Dodge automobile of Del Bono. They also had ample time to obtain arrest warrants of the defendants, but neglected to do so. This failure was held fatal to the prosecution in *Chapman v. United States*, 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776; *Taylor v. United States*, 286 U. S. 1; *Johnson v. United States*, 333 U.S. 10; and *Lustig v. United States*, 338 U.S. 74.

Appellee attacks Amended Conclusion V (R.B. p. 27), which states that by reason of the time served by appellants

and their good prison records, it would be "fair, just and equitable and serve the ends of justice to vacate and set aside the judgment of conviction and discharge petitioners." Appellee states that such ground is not a basis for collateral relief under this Court's decision. Appellee misses the point of such conclusion. It has been repeatedly held that 2255 motions and habeas corpus proceedings are equitable in nature, and the court may consider all the equities of the case in arriving at its decision. While it may be asserted that service of a considerable time in prison and good prison records of appellants do not furnish a basis for a collateral attack on the judgment, the court may, in determining what relief may be granted in a successful attack thereon, take into consideration the good prison records as one factor in order to do what equity and justice might require. The courts did thus in the cases of *McKenna v. Ellis*, 280 F. 2d 593; *Powell v. Hunter*, 172 F. 2d 330; *Hurley v. Reed*, 288 F. 2d 884; and *Powell v. Wiman*, 287 F. 2d 275. (See also O.B. pp. 50-53)

In its Reply Brief (pp. 27-33) appellee asserts that the issue with respect to the use of the Schmidt transmitter was disposed of by this Court's decision, and that appellants are precluded from raising the issue, because it was raised

and passed upon in previous appeals. We have discussed this at length in our Opening Brief (pp. 14-21) and have pointed out that under the case of *Lopez v. United States*, 373 U.S. 426, decided just two weeks before the Supreme Court's decision in *Marchese v. United States*, 304 F. 2d 154 (May 31, 1962), the Supreme Court impliedly overruled the case of *On Lee v. United States*, 343 U.S. 747, thus making the use of the hidden transmitting device a violation of a defendant's constitutional rights under the Fourth and Fifth Amendments. Under the *Sanders* case, *supra*, this violation could be considered regardless of previous rulings and decisions.

This Court, in the last appeal - as in two previous appeals, has avoided a direct ruling on the issue as to whether the use of an electronic device was a violation of Marchese's constitutional rights. In appellants' appeal from the judgment of conviction, the point was first raised that the use of radio equipment was forbidden by Section 605, Title 47, U. S. Code. No mention was then made in Appellants' Opening Brief that the defendants' constitutional rights were violated by such use. In a supplemental brief the point was raised. This Court affirmed the judgment of conviction without opinion, so

nothing could be ascertained as to the grounds of affirmation. Certiorari was thereafter denied by the Supreme Court. However, denial of certiorari by the Supreme Court carries with it no implication whatever of the Court's view on the merits of a case which it has declined to hear. (*Maryland v. Baltimore*, 338 U.S. 912, 919; *United States v. Carver*, 260 U.S. 482, 490; *Sunal v. Large*, 332 U.S. 174, 181)

In dismissing Marchese's petition for habeas corpus on June 29, 1961, Judge Pierson Hall did not pass on the merits of the petition, but stated that the issues presented had been "passed and repassed upon by the trial court. In view of the foregoing this Court lacks jurisdiction to entertain the Writ (*Jones v. Squire* (9th Cir. 1952) 195 F. 2d 179), and accordingly the Petition for the Writ is denied and it is ordered dismissed."

This Court, on May 31, 1962, affirmed said order (304 F. 2d 154), citing *Sunal v. Large*, 332 U.S. 174, and stated:

> "Petitioner, having failed to appeal from the denial of his motion under Section 2255, may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus."

The Court completely overlooked the exception set forth in *Sunal*, as well as in other Supreme Court decisions,(O.B.

pp. 23-25) namely, that the rule contended for *does not apply where constitutional rights are invaded.* Its error in holding to such rule was established when the Supreme Court granted certiorari and reversed and remanded the case to the District Court for further proceedings. The District Court followed such mandate, had a hearing and, among other issues raised, held that the use of the electronic transmitter was a violation of the defendants' constitutional rights.

On appeal, this Court again avoided rendering an opinion as to whether or not the use of the device was a violation of defendants' constitutional rights. Instead, it reverted to the same holding that the Supreme Court had previously rejected and reversed, to wit, that Section 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction. We submit that this was a direct variance from and contrary to the mandate of the Supreme Court, which had before it all the facts and issues raised by petitioner.

In the case of *Sanders v. United States, supra,* 373 U.S. 1, to which the order in the *Marchese* case referred, the Supreme Court reversed this Court. In that

case, also, there was no appeal from the judgment and no appeal from the denial of the first motion under Section 2255, yet the Supreme Court granted certiorari and rejected the aforesaid rule asserted by this Court in its opinion. Such rule does not apply to violation of constitutional rights, as was so aptly stated by Mr. Justice Black in his dissenting opinion in the case of *Hodges v. United States*, 368 U.S. 235.

We submit that this Court should review and revise its opinion, especially as to such issue, as it has the power and authority to do. (See discussion O.B. pp. 42-44) We especially urge this, since at no stage of the various proceedings, other than the findings and conclusions of Judge Clarke, was there ever a written opinion specifically on whether or not the use of the electronic transmitter was a violation of defendants' constitutional rights.

We pointed out in our Opening Brief (pp. 14-17) how the *On Lee* decision, *supra*, has been breached in subsequent decisions of the Supreme Court, culminating in the *Lopez* case, *supra*, and that now the law appears to be that the use of an electronic transmitting device is a violation of a defendant's constitutional rights under

the Fourth Amendment.

Appellee seeks to apply the language of the majority of the Court with respect to the use of the recording device to the use of an electronic transmitting device, despite the language of the concurring opinion of Mr. Justice Warren and the dissenting opinion of Mr. Justice Harlan, indicating that the majority of the Court felt there was a distinction between the use of a tape recorder to corroborate the Revenue Agent's testimony and a transmitting device. As to the latter, the Court considered the *On Lee* decision, *supra*, as being sapped of all vitality and authority.

There is a further distinction in the *Lopez* case, *supra*, and the instant case. Lopez knew that he was dealing with a federal agent and that whatever he said might be used against him. He, nevertheless, consented to the agent's presence in his office and made the statement recorded. The Court limited the use of the tape to corroboration. In the instant case, Sussman was a friend of Marchese and gained access to Marchese's apartment, not as a known federal agent but on a social and friendly basis without any knowledge on Marchese's part that Sussman was a "special employee" of the Government. His

entry into Marchese's apartment was, therefore, fraudulent and obtained by trickery. Such entry comes within the interdiction of the opinion in *Fraternal Order of Eagles v. United States*, 57 F. 2d 93 (Cert. denied by Supreme Court). In that case federal agents gained access to the lodge by posing as members of a distant branch of the lodge and presented false membership cards. After being admitted they perceived the possession of liquor, then prohibited by law, and on the basis of what they saw and heard they obtained search warrants. It was held that this was a violation of the Fourth Amendment and forbidden, for the reason that entry obtained through fraud, trickery or social acquaintance was, in fact, a trespass. The evidence was therefore suppressed.

Appellee contends (R.B. pp. 33-34) that any decision of the Supreme Court holding that the use of a transmitting device which would violate constitutional rights, would not be applied retroactively. The cases cited have nothing to do with unlawful searches and seizures prohibited by the Fourth Amendment and always enforced against federal officers but deal with new prohibitions imposed on the states through the Fourteenth Amendment. (*Mapp v. Ohio*, 367 U.S. 343) At any rate, Marchese has always raised the issue of unlawful search and was finally permitted to have an adjudication on

that issue by virtue of the Supreme Court's remand in the *Marchese* case, *supra*, on the authority of *Sanders v. United States*, *supra*.

B

[R.B. pp. 34-35]

Appellee asserts that the treatment of the motions as new or alternative motions would constitute an attempt to relitigate matters determined adversely by this Court. As we pointed out (O.B. pp. 26-29), the doctrine of *res judicata* does not apply to 2255 motions or habeas corpus. Moreover, in the *Sanders* case, *supra*, the Court held (p. 15) that controlling weight may be given to a denial of a prior application of habeas corpus only if "(2) the prior determination was made on the merits, and (3) the ends of justice would not be served by reaching the merits of the prior application. Even if the same ground was rejected on the merits, on a prior application, it is open to the applicant to show that the ends of justice would be served by the redetermination of the ground."

In the instant case Judge Clarke found at the 1963 hearing following remand by the Supreme Court that the ends of justice would be served by granting the motions

or petitions, and undoubtedly he would so find again. Such findings are also included in the proposed amended findings and conclusions. Furthermore, we submit that on the issue of the violation of the constitutional rights, there has never been an opinion on the merits, as we have pointed out *supra* and in our Opening Brief.

C. - 1

[R.B. pp. 35-38]

Appellee declares that the District Court was required to follow this Court's mandate and that the District Court properly denied appellants' motions. This denial was without prejudice to the renewal of such motions pending clarification of the ambiguity in this Court's opinion, which governs the construction of the mandate.

The cases cited by appellee are civil cases covering judgments between civil litigants, except the case of *Bailey v. Henslee*, 308 F. 2d 840. In that case the mandate reversing the District Court expressly directed the District Court to grant habeas corpus unless the State should retry petitioner within nine months from the mandate. The question was when did the nine months period commence to run, and this question had to be

answered by the Circuit Court on the second appeal. It is noteworthy that in that case the matter went twice to the Supreme Court of Arkansas, twice to the United States District Court, twice to the Circuit Court, and four times to the Supreme Court, before it reached the Circuit Court in the final determination cited above.

In the cited case of *In re Sanford Fork & Tool Co.*, 160 U.S. 247, the Supreme Court stated with respect to its mandate (page 256):

> "But the Circuit Court may consider and decide any matters left open by the mandate of this court, and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a writ of mandamus or upon a new appeal, it is for this court to construe its own mandate, and act accordingly."

We submit that the above statement is applicable to the instant case, because the opinion and mandate of the Court require them to be construed. We further contend that this Court left open certain matters which could be determined by the District Court at a hearing.

[R.B. pp. 38-40]

Appellee contends that the Circuit Court's ruling that Section 2255 cannot take the place of an original appeal, or to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction, is the "law of the case." We have already pointed out that the rule of *res judicata* does not apply to 2255 motions or to habeas corpus and that the Supreme Court has granted certiorari on grounds determined previously against petitioners on appeal or denial of habeas corpus or 2255 motions.

The "law of the case" is a rule of practice almost exclusively applied to decisions between civil litigants. In the cited case of *Fountainbleau Hotel etc. v. Crossman*, 286 F. 2d 926 (a civil case), the court made a distinction between the rule of *res judicata* and the "law of the case," stating at page 199:

> "And although the latter [*res judicata*] is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here."

In the case of *Southern Ry. Co. v. Cleft*, 260 U.S. 316 (a civil case), in rejecting the application of the

application of the "law of the case" doctrine, the court stated at page 319:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata;* one directs discretion, the other supersedes it and compels judgment."

In the cited case of *Virginia Electric & Power v. N.L.R.B.*, 132 F. 2d 390, the court stated that the law of the case did not preclude it from varying from its former decision in view of subsequent decisions of the Supreme Court. Its duty was to decide according to the present situation and not to that existing at the time of the former appeal.

4. - 7

[R.B. pp. 41-45]

The cases cited by appellee under this heading are inapposite, since in those cases (being civil cases) the mandates were explicit as to the judgments to be entered by the trial court. In the instant case there was no clear and explicit mandate for the District Court to follow. We submit that (See O.B.) the District Court had full jurisdiction, power and authority to grant the motion of appellants.

8

[R.B. pp. 46-48]

In the above point, appellee cites only civil cases involving the determination of rights between civil litigants. We submit that in criminal cases or quasi-criminal cases involving the liberty of petitioners as in 2255 motions or habeas corpus, different rules are applicable. The only issue is, not as to rights existing between litigants, but whether or not petitioner shall be discharged from custody or remanded to and detained in prison. If there has been a change in the law affecting petitioners' rights in petitioner's favor, previous rulings on the theory of the "law of the case" have no part, and such rule should not be applied to petitioner's case any more than the rule of *res judicata*. In fact, the latter rule is much more compelling and, yet, as it has been repeatedly held, such rule is not applicable to 2255 motions or habeas corpus.

D

[R.B. pp. 48-49]

The last point raised by appellee is that, since appellants were not in custody, the District Court had no jurisdiction to entertain motions under Section 2255. If the Court had denied the motions of appellants to file

amended findings, conclusions and judgment, absolutely, and had remanded appellants to custody forthwith, it could entertain the motions as new and alternative motions under Section 2255. However, the District Court denied, without prejudice, the motions to file such amended findings etc. pending clarification by this Court of its mandate, and permitted, pending an appeal, the appellants to remain on bond. The District Court, therefore, reserved its ruling on said motions as new or alternative motions under Section 2255 until after such clarification, to determine what action may be necessary in connection therewith.

We submit that the Circuit Court should authorize the filing of the amended findings, conclusions and judgment discharging appellants, thereby terminating the matter. If this Court should determine otherwise, adversely to appellants, then on remand of them to custody, the District Court may then consider the motions as new or alternative motions under Section 2255 or Section 2243 for habeas corpus.

CONCLUSION

In conclusion, we respectfully submit that the mandate of the Supreme Court in *Marchese v. United States, supra,* 374 U.S. 101, requiring the District Court to reconsider in the light of *Sanders v. United States, supra,* 373 U.S. 1, should be followed by this Court, and that the finding that appellants' constitutional rights have been violated, even if in one instance only, as for example in the use of the Schmidt transmitter, should be sustained. Furthermore, the District Court's finding and conclusion that it would be fair, just and equitable and in the ends of justice that appellants' motions be granted and that they be discharged, being within the jurisdiction, purview and discretion of the District Court, should also be upheld. Thus the amended judgment discharging appellants absolutely, and not merely for time served, should be authorized or directed by this Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.
